164-702

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~805~~. 416

JAMES B. WILSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JANUARY 22, 1896.

(16,155.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 25, 1896.

1 Law.

UNITED STATES OF AMERICA:

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Indiana, wherein James B. Wilson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal District Court of the United States, District of Indiana.

Witness the Hon. John H. Baker, judge of the district court of the United States for the district of Indiana, this 23d day of December, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN H. BAKER, *Judge.*

2 Service of the within citation acknowledged this 23rd day of December, 1895.

FRANK B. BURKE,
U. S. Attorney.

3 UNITED STATES OF AMERICA:

The President of the United States of America to Hon. John H. Baker, judge of the district court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said district court, before you, between The United States and James B. Wilson, a manifest error hath happened, to the great damage of the said James B. Wilson, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal District Court of the United States, District of Indiana.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said *circuit* court this 23d day of December, A. D. 1895.

NOBLE C. BUTLER, *Clerk.*

4 Pleas of the district court of the United States within and for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and ninety-five, before the Honorable John H. Baker, judge of said district court of the United States for the district of Indiana.

UNITED STATES *vs.* JAMES B. WILSON. } No. 5395. Violation of the Postal Law.

Be it remembered that heretofore, to wit, at the May term of said court, on the 16th day of May, 1895, the grand jurors of the United States, impanneled, sworn, and charged to inquire for the United States within and for the body of said district, returned into court an indictment in the above-entitled cause, endorsed by their foreman "a true bill," in the words following, to wit:

UNITED STATES OF AMERICA, *District of Indiana,* } *ss:*

In the District Court of the United States for the District of Indiana, May Term, A. D. 1895, at Indianapolis.

The grand jurors of the United States within and for the district of Indiana, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States, within and for the district of Indiana aforesaid, upon their oath present that James B. Wilson, late of said district, at the district aforesaid, on the third day of December, in the year of our Lord one thousand eight hundred and ninety-four, unlawfully, knowingly, and feloniously did then and there deposit and cause to be deposited for mailing and delivery through the mails of the United States, in the post-
5 office at the city of Indianapolis, in said district, a certain obscene, lewd, lascivious, and indecent paper, then and there known and designated as The People and dated Indianapolis, Indiana, Saturday, December 3, 1894, which said paper was then and there inclosed in a wrapper and directed and addressed as follows, to wit: A. S. Snider, Southport, Marion county, Ind.; which said obscene, lewd, lascivious, and indecent paper and publication is so obscene, lewd, lascivious, and indecent as to be offensive to the court and is not fit matter to appear in the records of this court, and for which reason the same is not set out in the indictment;

that said paper purports to be a newspaper published and edited by the said James B. Wilson and one Enos B. Reed, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States of America.

FRANK B. BURKE,
U. S. District Attorney.

And afterwards, to wit, at the November term of said court, on the 3d day of December, 1895, before the Honorable John H. Baker, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now Frank B. Burke, Esq., attorney for the United States, and at the same time also comes the defendant in person and by John W. Kern, Esq., his attorney, and said defendant, by his said attorney, now moves the court to quash the indictment herein; and the court, having heard the argument of counsel and being sufficiently advised in the premises, overrules said motion to quash; to which ruling of the court the defendant, by his attorney, excepts; and now said defendant, being arraigned upon said indictment, for plea thereto says he is not guilty; and this cause coming on to be tried here comes a jury, to wit, Erastus Burch, George W. Calloway, W. H. Deniston, David L. Duke, William Ewing, John Hart, Henry Johnson, Herman Krueger, Thomas Marshall, Jackson Powell, Fred. Rybolt, and Evan Weir, who, being duly impaneled and sworn and having heard the evidence, argument of counsel, and charge of the court, now retire to their room to consider of their verdict herein.

6

And afterwards, to wit, at the November term of said court, on the 4th day of December, 1895, before the Honorable John H. Baker, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Frank B. Burke, Esq., attorney for the United States, and the defendant, in person and by John W. Kern, Esq., his attorney, also comes; and the jury heretofore impaneled in this cause come also and return into court the verdict following:

We, the jury, find the defendant guilty as charged in the indictment.

HERMAN KRUEGER, *Foreman.*

And afterwards, to wit, at the November term of said court, on the 12th day of December, 1895, before the Honorable John H. Baker, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Frank B. Burke, Esq., attorney for the United States, and the defendant in person and by John W. Kern, Esq., his attorney, also comes and files his motion for a new trial herein in the words following, to wit:

Comes now the defendant in the above-entitled cause and moves

the court here for a new trial of the same, and as reasons
7 therefor assigns:

1. That the verdict of the jury was contrary to law.

2. That the verdict of the jury is contrary to the evidence and is not supported thereby.

JNO. W. KERN,
Att'y for Defendant.

And the court being sufficiently advised doth now overrule said motion for a new trial; to which ruling of the court the defendant, by his said attorney, now excepts; and said defendant, by his said attorney, now files his motion in arrest of judgment in the words following, to wit:

Comes now the defendant in the above-entitled cause and moves the court here that judgment herein be arrested and not pronounced or rendered for the reason:

1. That the indictment herein does not state facts sufficient to constitute a public offence.

2. That the indictment herein is defective in this, to wit, that it does not indicate nor pretend to indicate the part or parts of the newspaper therein mentioned which contained objectionable matter, and

That said indictment does not charge that the defendant had knowledge that said paper contained lewd, indecent, obscene, or other objectionable matter.

JNO. W. KERN,
Att'y for Defendant.

And the court being sufficiently advised doth now overrule said motion in arrest of judgment; to which ruling of the court the defendant, by his said attorney, now excepts; and said attorney for the United States now moves the court for judgment upon the
8 verdict of the jury heretofore rendered herein.

It is therefore considered by the court that said defendant, James B. Wilson, for the offence charged in said indictment be imprisoned and confined at hard labor in the northern State prison of the State of Indiana for the term of two (2) years, and that he do pay unto the United States a fine of two hundred and fifty dollars ($250), together with the costs of this prosecution, taxed at $—, and that he do stand committed until said fine and costs are paid.

And it is ordered by the court that the clerk do withhold the warrant of commitment herein for the period of ten days from this date.

And afterwards, to wit, at the November term of said court, on the 23d day of December, 1885, before the Honorable John H. Baker, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Frank B. Burke, attorney for the United States, and at the same time also comes the defendant in person and by his attorney and files his petition for a writ of error to the Supreme Court of the United States in the words following, to wit:

And now comes James B. Wilson, the defendant herein, and says that on the 12th day of December, 1895, the court entered judgment against him in favor of the United States of America, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may
9 issue in this behalf to the Supreme Court of the United States for the correction of errors as complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

JOHN W. KERN,
Att'y for Defendant.

And at the same time said defendant, by his said attorney, files his assignment of errors herein in the words following, to wit:

The defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors which, he avers, occurred upon and prior and subsequent to the trial of the cause, to wit:

1. The court erred in overruling this defendant's motion to quash the indictment herein.

2. The court erred in overruling the defendant's motion in arrest of judgment herein.

JOHN W. KERN,
Att'y for Defendant.

And said writ of error is now by the court allowed, and the same to operate as a supersedeas pending the hearing and decision of the cause in the Supreme Court of the United States, upon his filing a bond in proper form in the penalty of three thousand dollars, with sureties to the approval of the court; and said defendant now files his bond herein in the penalty of three thousand dollars, with Thomas F. Quill, Philip Zapf, George R. Colter, William C. Yeager, Henry W. Langenberg, Harry A. Walker, Isaac King, and Martin M. Hugg sureties thereon; which bond is now approved by the court, and said bond is in the words following, to wit:

Know all men by these presents that we, James B. Wilson,
10 Thomas F. Quill, Philip Zapf, George R. Colter, William C. Yeager, Henry W. Langenberg, Harry A. Walker, Isaac King, and Martin M. Hugg, are held and firmly bound unto the above-named United States of America in the sum of three thousand dollars, to be paid to said United States of America; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this 23d day of December, 1895.

Whereas the above-named James B. Wilson hath prosecuted a writ of error to the Supreme Court of the United States to reverse

the judgment rendered in the above-entitled suit by the district court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above-named James B. Wilson shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged or awarded against him if he shall fail to make good his plea and shall abide and perform the judgment and orders of the Supreme Court herein and of the said district court made in pursuance to the mandate of the Supreme Court, then this obligation to be void; otherwise in full force.

JAS. B. WILSON.	[SEAL.]
THOS. F. QUILL.	[SEAL.]
PHILIP ZAPF.	[SEAL.]
GEORGE R. COLTER.	[SEAL.]
WM. C. YEAGER.	[SEAL.]
HENRY W. LANGENBERG.	[SEAL.]
HARRY A. WALKER.	[SEAL.]
ISAAC KING.	[SEAL.]
MARTIN M. HUGG.	[SEAL.]

Taken and approved by me this 23d day of December, 1895.

JOHN H. BAKER, *Judge.*

11 UNITED STATES OF AMERICA, *District of Indiana,* } ss:

I, Noble C. Butler, clerk of the district court of the United States within and for said district, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the cause of The United States against James B. Wilson, as fully as the same appears upon the records now in my office.

Seal of District Court of the United States, District of Indiana.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 24th day of December, A. D. 1895.

NOBLE C. BUTLER, *Clerk.*

12 In the Supreme Court of the United States.

THE UNITED STATES *vs.* JAMES B. WILSON. } Assignment of Errors in the Supreme Court.

Of — term, in the year of our Lord one thousand eight hundred and ninety-six.

Afterwards, to wit, on the first Monday of February, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said James B. Wilson, by John W. Kern, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the court below, to wit, the United States district court for

the district of Indiana, erred in overruling his motion to quash the indictment herein, the said indictment not containing facts sufficient in law to constitute a crime against the statutes of the United States.

There is also error in this, to wit, that the said court erred in overruling his motion in arrest of judgment herein, and the said James B. Wilson prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment.

JOHN W. KERN,
Att'y for Plaintiff in Error.

13 [Endorsed:] No. —. In the U. S. Supreme Court. The United States *vs.* James B. Wilson. Assignment of errors in Supreme Court. J. W. Kern, att'y for pl'ff in error.

Endorsed on cover: Case No. 16,155. Indiana D. C. U. S. Term No., 865. James B. Wilson, plaintiff in error, *vs.* The United States. Filed January 22, 1896.

64-702

164-702

Office Supreme Court U. S.
FILED.
FEB 28 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JAMES B. WILSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. ~~865.~~ 416.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JAMES B. WILSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 865.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and moves the court to advance the above-entitled cause upon the docket, and assign it for hearing at an early day during the next term of the court.

The defendant was indicted in the district court of the United States for the district of Indiana, at the May term, 1895, for having deposited for mailing in the post-office at Indianapolis a certain obscene paper known as The People. He was tried, found guilty, and sentenced to confinement at hard labor in the Northern State Prison of Indiana for two years, and to pay a fine of $250 and costs. He sued out his writ of error, and, pending the decision of this court thereon, has been admitted to bail in the sum of $3,000.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

164-702

DEC 26 1896
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 416.

JAMES B. WILSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

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Office Supreme Court, U. S.
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BRIEF FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 416.

JAMES B. WILSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error was charged by indictment in the court below with a violation of section 3893 of the revised statutes of the United States.

Omitting the introductory and formal parts, the indictment is as as follows:

"That James B. Wilson, at etc., on etc., unlawfully, knowingly and feloniously, did then and there deposit and *cause to be deposited*, for mailing and delivering through the mails of the United States, in the post office at the city of Indianapolis, in said district, a certain obscene lewd, lascivious and indecent paper, then and then known and designated as The People, and dated Indianapolis, Ind., Saturday, December 3, 1894, which said paper was then and there enclosed in a wrapper and directed and addressed as follows, to wit: A S. Snider, Southport, Marion County, Ind; which said obscene, lewd, lascivious and indecent paper and publication is so obscene, lewd, lascivious and indecent as to be offensive to the court and is not fit matter to appear in the records of this court, and for which reason the same is not set out in the indictment; that said paper purports to be a newspaper published and

edited by the said James B. Wilson and one Enos B. Reed, contrary to the form of the statute, etc." (Transcript of Record, pp. 2 and 3)

A motion to quash the indictment was made before the trial, which motion was overruled and the proper exceptions reserved.

The record on that subject is as follows:

"And said defendant by his said attorney now moves the court to quash the indictment herein; and the court having heard the argument of counsel and being sufficiently advised in the premises, overrules said motion to quash; to which ruling of the court, the defendant by his attorney excepts." (Trans of Record p. 3,)

There was a trial by jury, a verdict of guilty, motions for a new trial and in arrest of judgment interposed and overruled, and judgment rendered, sentencing the defendant to two years imprisonment in the State Prison and to the payment of a fine of $250.00.

Two errors are assigned, namely:

1. That the court erred in overruling the motion to quash the indictment and

2. That the court erred in overruling the motion in arrest of judgment.

ARGUMENT.

The only question for discussion here grows out of the first assignment of errors, and relates to the sufficiency of the indictment as against a motion to quash seasonably made.

The statutes of Indiana provide that "The only pleading necessary on the part of the accused is either a motion to quash, or a plea." Sec. 181, R. S. Ind. 1881. Also that

"The defendant may move to quash the indictment or information when it appears upon the face thereof either

First: That the grand jury which found the indictment had no legal authority to inquire into the offense charged.

Second: Thst the facts stated in the indictment or information do not constitute a public offence.

* * * *

Fourth: That the indictment or information does not state the offense with sufficient certainty." R. S. Ind. 1881, Sec. 184.

It will therefore be observed that in the courts of Indiana, and the Federal Courts of that district, a motion to quash, corresponds to the demurrer, by which in other jurisdictions the sufficiency of the indictment is tested.

The principal objection to this indictment is that it fails to charge that the defendant had knowledge of the indecent and lewd matter alleged to have been contained in the newspaper, which he is charged with having deposited or caused to be deposited in the mails.

It charges that the defendant, unlawfully,knowingly and feloniously did then and there deposit *and cause to be deposited* for mailing, etc., in the post office at Indianapolis a certain obscene, lewd, lascivious paper, known and designated as the People, which paper is so obscene, etc. as to be offensive, etc., and therefore not set out in the indictment, and that said paper purports to be a newspaper, published and edited by the defendant, *and one Enos B Reed.*

From this indictment it will be observed:

1. That the paper mailed was a newspaper.

2. That it had two editors and publishers.

3. That no particular item or article therein is designated as obscene, lewd or indecent.

4. That the charge against the defendant is for depositing *and causing to be deposited* the paper, so that proof of either would support the allegation.

5. That the only allegation of knowledge on the part of the defendant of the objectionable character of the paper, is the use of the word "knowingly," in connection with the words "unlawfully" and "feloniously," in the phrase "unlawfully, knowingly and feloniously did then and there deposit and cause to be deposited *for mailing and delivery* through the mails, in the postoffice, etc."

It will not be disputed that the knowledge of the defendant, that the paper deposited by him, or by another for him contained objectionable matter, is an essential element of the crime sought to be charged. It would be monstrous to hold that one of two editors and publishers of a newspaper made up of scores of separate articles and items, should be adjudged a criminal because he had directed the mailing of the paper, published in the usual way,—the paper containing an objectionable article which he had never seen, and of which he had not the slightest knowledge.

Such knowledge, then, being an essential element of the crime, must be charged, in the indictment, with the same degree of certainty as any other essential ingredient.

The central question for discussion, then, is: Does this indictment, by the use of the word "knowingly," as above stated. charge such knowledge with the necessary degree of certainty to withstand a demurrer, seasonably interposed?

In the case of *United States* v. *Slenker*, 32 Fed. R. 691, the question as to the sufficiency of an indictment in all respects identical, was presented on a motion in arrest of judgment, and on the authority of *Com.* v. *Boynton*, 12 Cush. 499, and other authorities cited, Judge Paul held the indictment insufficient, and sustained the motion in arrest.

In the course of his opinion he says: "The defendant is charged with knowingly depositing and causing to be deposited in the mail, for mailing and delivery, certain obscene papers, etc. She may knowingly have done this; she may knowingly have caused it to be done, and yet be entirely ignorant of the obscene character of the writings, etc., so deposited, and consequently not guilty of the offense described in the indictment. 'Knowingly' in the indictment must be limited to the act of depositing, for mailing and delivery, the obscene matter in the mail, and cannot be extended to include a guilty knowledge of the writings, papers, etc"

The same question was presented to Mr. Justice Gray in the case of *United States* v. *Chase*, 28 Fed. R. 807.

In that case there had been a plea of guilty, after which the indictment was challenged for the first time by motion in arrest of judgment, for the reason that it charged that the defendant knowingly deposited the letter, and not that he knew its character.

Mr. Justice Gray in his opinion conceded that this objection to the indictment was supported by the decision in the case of *Com.* v. *Boynton*, 12 Cush. 499, and while he did not question the authority of that case, held, that under Section 1025 R. S. U. S. the objection afforded no ground for a motion in arrest of judgment after a plea of guilty.

In the case of *United States* v. *Dunbar*, 60 Fed. R. 76, Judge Bellenger distinguished the case of *United States* v. *Slenker supra*, from the one under consideration, but said: "A person may knowingly deposit a letter or paper in the mails without knowledge of its obscene character. The averments of such an indictment may therefore be true, and yet the defendant be innocent."

Com. v. *Boynton*, 12 Cush. 499, on the authority of which the decision in *United States* v. *Slenker supra* was made, is a leading case on the subject under discussion, and the doctrine therein laid down has never been questioned. In that case the indictment charged that the defendant "did knowingly sell unto one Jeremiah Barker a certain piece of diseased, corrupted and unwholesome provisions, to-wit: one hind leg of veal, the said Boynton not then and there making known fully to said Barker that the same was diseased, corrupted and unwholesome, etc."

In considering the sufficiency of the indictment, the Court, speaking by Bigelow, J., said: "Such being the nature of the offense charged upon the defendant, he has the right to insist that it should be formally and substantially described; that is, set out in the indictment with technical precision and accuracy, according to the rules of the common law; *Com.* v. *Davis*, 11 Pick 432, 438; *Com.* v. *Phillips*, 16 Pick. 211–213. It is a familiar rule of criminal pleading that wherever the intention of a party is necessary to constitute an offense, ***such intent must be alleged in every material part of the description where*** it so constitutes it. * * * *

"In the present indictment the only distinct averment of knowledge on the part of the defendant is, that he 'knowingly sold' corrupt and unwholesome meat. There is no averment that he knew the meat to be in a diseased and unhealthy state, or unfit for food at the time of the sale. The word 'knowingly' does not apply to and qualify every act charged, essential to constitute the offense under the statute; strictly speaking, and construing the language of the indictment according to the technical rules of pleading, it qualifies, and gives significance only to the word 'sell'; so that in substance and legal effect the averment is only that the act of sale was done by the defendant knowingly. But there is no allegation of any knowledge by him, at the time sale was made, of the condition of the meat. The whole allegation might, therefore, be true, and yet the defendant might be innocent of any offense.** The averment of knowledge does not extend to each part of the description of the offense in which it is an essential element. The indictment is, therefore, fatally defective."

In the case of *Rosen* v. *United States*, 161 U. S. 29, the indictment was, in most respects, identical with that under considertion, but was challenged for the first time after verdict by a motion in arrest. The decision there, follows that of Mr. Justice Gray in *United States* v. *Chase supra*, and is based on the same ground, namely, that the "defect"

in the indictment "*should be regarded after verdict, and under the circumstances attending the trial*, as one of form, under U. S. Rev. Stat. Sec. 1025."

Mr. Justice Harlan in the opinion said:

"Undoubtedly, the mere depositing in the mail of a writing, paper or other publication, of an obscene, lewd or lascivious character, is not an offense under the statutes if the person making the deposit was at the time, and in good faith, without knowledge, information or notice of its contents. The indictment would have been in better form, if it had more distinctly charged that the accused was aware of its character. But this defect should be regarded after verdict, etc."

In this opinion, then, it is admitted, that knowledge of the defendant is not as distinctly charged as it should have been, and that in this regard there is a defect in the indictment; but the defect is cured by the statute of jeofails referred to, after verdict.

To quote again from the opinion:

"The case is therefore not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate, or imperfect statement of a fact, and such statement, *after verdict*, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

We are entirely satisfied with the doctrine laid down in the decision in the Rosen case, for it gives strong support to our contention here.

It declares that the indictment is defective, in that its allegations as to a vital part of the offense charged are not sufficiently distinct. It characterizes this important allegation as an inaccurate and imperfect statement of a fact, and only decides that this "defect," lack of distinctness, "inaccurate or imperfect statement of a fact," are not available to the defendant after verdict, by reason of the provisions of section 1025 *supra*.

We submit to the court, that there is no authority, English or American which holds that an indictment charging an infamous crime, and having all these infirmities, to wit., the inaccurate or imperfect statement of fact in the charge of guilty knowledge, or criminal intent, or a lack of distinctness in that regard is sufficient to withstand a demurrer, seasonably interposed. Such authorities are all agreed, as we shall presently show, that in the consideration of a demurrer, so interposed, the statements of fact, in the charging part of the indictment, are not "taken in the broadest sense authorized by the words used," but on the contrary that "all material facts and circumstances embraced in the definition of the offense, must be stated, and that, if any essential element of the crime is omitted such omission cannot be suplied by intendment or implication. The charge must be made directly and not inferentially, or by way of recital."

Pettibone v. *United States*, 148 U. S. 202.

United States v. *Hess*, 124 U. S. 486.

After the case of *Rosen* v. *United States*, *supra* was decided, the question as to the sufficiency of an indictment in all respects identical with the one under discussion came up before Judge Severens of the Western district of Michigan, on a motion to quash, in the case of *United States* v. *Reid*, 73 Fed. R. 289.

As the case is precisely in point we quote liberally from the opinion. * * "The allegation in the indictment is that the respondent 'did unlawfully and knowingly, deposit in the postoffice * for mailing and delivery certain printed newspapers, * * and each * contained, amongst other things, a certain obscene, lewd, lascivious and indecent article in print.' It will be observed, that while this language charges an unlawful and conscious depositing in the mails of the offensive matter, it does not in terms, charge that the respondent knew that that which he so deposited contained offensive matter. It is undoubtedly an element of the offense prescribed by the statute on which this indictment is framed, that the party charged must have known the character of the publication, when it was deposited by him in the mail, and the ground of the present objection is that it is nowhere charged in this indictment that the defendant had such knowledge.

The decisions in the various federal courts upon the question whether the employment of the words "unlawfully and knowingly" applies not only to the depositing, but also to the character of the thing deposited are apparently in some conflict.

The result to be drawn from an analysis of all of them would seem to be that *the determination of the question depends upon the time when the objection is made.*

There is a difference in the rule to be applied, and which is applied in all pleadings whether civil or criminal, at one of these stages from that which applies at the other. The rules of criminal pleading, especially, require a reasonable precision, and fullness of statement to describe all the elements included in the offense; and if it is not done, the pleading is open to challenge, if such challenge is seasonably interposed.

If, however, no objection is made to the allegations of the pleading, but those allegations do contain some informal, and technically uncertain averments, from which the inference can be fairly drawn that the intention was to charge the existence of that element of the offense, and the defendant by not interposing his objection thereto has accepted the same as sufficient, and gone on with the trial of the cause, it will not be competent for him, on a motion in arrest of judgment, to then allege that the averments in the indictment were not sufficient to charge the characteristic fact in question.

The authorities upon the precise question now under consideration may be nearly all harmonized by this distinction: That the word 'knowingly' in connection with the words charging the deposit, and character of the matter deposited, will, after trial and verdict, be admitted to have applied to both those elements of the offense, upon the ground that in common speech, that would be the ordinary interpretation of such form of expression,—that is to say, it would have been an inference by common intendment; and on the other hand, that it would not be regarded as a sufficient averment of knowledge of the character of the thing deposited, under the more stringent rule which applies to pleadings when tested by a seasonable objection to their sufficiency; and it appears to be the conclusion justly to be drawn from the mass of decisions on the subject, that the form of pleading here employed is not sufficient, when tested by the rule of pleading to which I have adverted."

The court will observe that Judge Severens follows the line of reasoning adopted by Mr. Justice Harlan in the Rosen case *supra*, and yet reaches the conclusion, which we think is irresistible in the light of all the authorities, that the indictment is not sufficient to withstand a motion to quash, seasonably made.

It is true that the indictment in this case is substantially in the language of the statute, but that fact does not excuse the want of distinct and clearly stated allegations charging with certainty every ingredient of the offense, without reliance upon the introductory epithets "feloniously," "unlawfully," "knowingly," "falsely," etc.

In the case of *United States* v. *Carll*, 105 U. S. 611, the indictment followed the language of the statute, and charged that the defendant feloniously, and with intent to defraud a bank named, did pass, utter, and publish upon and to said bank a falsely made, forged, counterfeited and altered obligation and security of the United States. It did not charge that the defendant knew the instrument to be false, forged and counterfeited.

It was doubtless urged in that case that the averments that the defendant acted "feloniously" and "with intent to defraud" in what he did, were sufficient, and obviated the necessity for a direct and positive averment of knowledge.

But Mr. Justice Gray, speaking for the court, said:

"In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

Citing: *United States* v. *Cruikshank*, 92 U. S. 542.
United States v. *Simmons*, 96 U. S. 360.
Commonwealth v. *Clifford*, 8 Cush. 215.
Commonwealth v. *Filburn*, 119 Mass. 297.

Now let us suppose that the indictment in the Carll case had contained, in connection with the word "feloniously," the word "knowingly," so that it would have charged the defendant with having feloniously, knowingly, and with intent to defraud the bank named, uttered, passed, etc., a certain falsely made and counterfeited instrument, would such use of the preliminary adverb "knowingly" be held to supply the omission of a direct, distinct and positive averment of knowledge on the part of the defendant of the character of the instrument?

To but state the question will compel a negative answer, and yet the indictment under discussion is precisely like that in the Carll case with the word "knowingly" inserted.

In the case of *Pettibone* v. *United States*, 148 U. S. 200, there was an indictment for conspiracy to obstruct the administration of justice, by threats and force, under sections 5399 and 5440 R. S. U. S.

The indictment was rich in epithets.

After setting forth the contents of a writ of injunction, regularly

issued, it charged that the defendants, while such writ was in full force, did "unlawfully, corruptly, fraudulently and feloniously conspire together to commit an offense against the United States;" that the offense consisted in a violation of the writ of injunction; that the defendants "did then and there unlawfully, corruptly, fraudulently, willfully and feloniously" compel certain employes, by intimidation and violence, to cease their employment, etc., and, also, that such defendants unlawfully, willfully, etc., did conspire, etc, to commit an offense against the United States, to-wit: To corruptly, and by force and threats, obstruct and impede the administration of justice in the United States Circuit Court for the Ninth Judicial District, and did thereafter, in pursuance of such unlawful and malicious combination and conspiracy, unlawfully, willfully and feloniously, in the manner and form aforesaid, corruptly and by force and threats of violence, obstruct and impede the due administration of justice in the said United States Circuit Court.

This court held that the charge in an indictment must be made directly, and not inferentially or by way of recital, and that if any essential element is omitted it cannot be supplied by intendments or implication. It was also held that the scienter is necessary whenever knowledge is an essential ingredient of the offense, and not implied in the statement of the act itself, citing *Wharton Cr. Pl and Pr.* 164.

And notwithstanding the prolific use of the adverbs "willfully," "corruptly," "unlawfully," "feloniously," etc., the court held that a direct allegation was necessary, charging that the defendants had knowledge, or notice, or information, of the pendency of proceedings in the United States Court, or the progress of the administration of justice therein, before they could be found guilty of obstructing or impeding, or endeavoring to obstruct or impede the same, and there having been an omission to make such allegations, the indictment was held to be bad on motion to quash.

It will be observed that in the Pettibone case it was charged in the indictment that the defendants committed all the acts complained of "willfully," which is equivalent to a charge that they committed them "knowingly," and yet it did not occur to the court that the omission of the material allegations of knowledge was cured by the use of the many adverbial epithets.

It was held by this court in *United States* v. *Cook*, 17 Wallace 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged;" and in the case of *United States* v. *Cruikshank*, 92 U. S. 542, Chief Justice Waite, after quoting the above, with approval, said:

"It is an elementary principle of criminal pleading that when the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall state the offense in the same generic terms as in the definition, but it must state the species; it must descend to particulars. 1 *Arch Cr. Pl and Pr.* 291. A crime is made up of acts and intent, and these must be set forth with reasonable particularity of time, place and circumstance."

In the recent case of the *State* v. *Howard*, 68 N. W. 1096, the indictment charged that the defendant "did wrongfully, unlawfully and feloniously hire, procure and cause one Billings to offer a bribe, and money of

value to said juryman Otto, then and there serving on the said jury as aforesaid, with the intent on the part of him the said (defendant) and him the said Billings, to influence the action, vote, opinion and decision of him the said juryman Otto, as a juryman in said cases and actions, and to cause him the said juryman Otto to hang the said jury, and regardless of his, the said Otto's convictions in the matters involved in said cases and actions, prevent a verdict being rendered in said cases and actions against said defendant; and that the said Billings did then and there unlawfully and feloniously offer the said bribe and money to the said juryman, Otto, for the purpose aforesaid, and with the intent aforesaid, solely by reason of his being hired, procured and caused to do so by the said (defendant) as aforesaid, the said (defendant) being then and there in the employment of the defendant in the cases and actions, and at said time and place engaged in assisting the said defendant in and about the trial of said cases and actions, contrary, etc.

A demurrer to this indictment was interposed, on the ground that it was not alleged therein that the defendant knew that the person to whom the offer was made was then a juror.

The prosecution cited the statute which provides that "no indictment is insufficient by reason of a defect or imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

The Supreme Court (Minnesota), speaking by the Chief Justice, said of this statute:

"These are wholesome and sensible provisions, which should be liberally construed, and indictments sustained where the objection is as to matters of form and not of substance. But they were not intended to encourage laxity in criminal pleading in matters of substance, but simply to cure a 'disease of the law' resulting from the overnicety of courts and their lack of practical sense in giving effect to formal defects in indictments. The statute dispenses with mere formality and technicality, but the requirement that the indictment must be direct and certain as regards the offense, and the particular circumstances thereof is imperative. The rule that the charge must be laid positively, and not inferentially, by way of recital merely is not abrogated by the statute. * * * But if the statute does not set forth all the elements necessary to constitute the offense intended to be punished, an indictment which simply follows the words of the statute is not sufficient. It must, in such case, go further and allege with certainty all of the particular facts necessary to bring the case within the intent and meaning of the statute. * * * It must state directly the facts whence the result comes. 1 *Bish. Cr. Proc.* Secs. 626-28. * * * The essential elements of the crime of offering a bribe to the juror or judicial officer, as necessarily inferred from the statute, include *knowledge* on the part of the accused of the official character or capacity of the person to whom the bribe is offered. * * * It is necessary to allege directly, and not by way of recital or argument, the official character or capacity of the person to whom the offer was made, *knowledge* that he was such juror or officer by the defendant, the name of the thing offered (if known), the fact that it was of value, and that it was offered with intent to influence the official action of such person. * * * It is urged that the allegations in the

indictment to the effect that the defendant was employed on the trial of the cases in which the person to whom the offer was made was a juror, and that he caused the offer to be made with intent to influence his action as such juror is a sufficient allegation of knowledge on the part of the defendant. But both knowledge and intent are essential elements of the crime, and both should be charged directly, and not argumentatively or by way of recital."

The opinion concludes in these words:

"We are not to be understood as holding that this indictment would be held insufficient if the objections thereto were made for the first time after verdict. In such case, we would be inclined to resort to all permissible intendments to sustain it."

In the case of the *State* v. *Blauvelt*, 38 N. J., (Law) 306, the indictment was for obtaining money under false pretenses, and charged that the defendant unlawfully and designedly did falsely pretend, etc.

Mr. Justice Reed, speaking for the court said:

"The indictment is defective in not containing an averment of a *scienter*. The statement that the defendant unlawfully and designedly did falsely pretend, is insufficient. Indeed he may have made the statement to procure an endorsement, and at the time intended to compel the endorser to pay the note and so cheat him, but if he did not *know* that the statement was untrue, it is not within the meaning of the statute."

In *Cearfoss* v. *The State*, 42 Md. 407, the court says:

"Things which do not come within the words are not to be brought within them by construction."

See also *State* v. *Gary*, 36 N. H. 359.

The Supreme Court of California, in the case of *People* v. *Williams*, 35 Cal., 671, in considering the requisites of an indictment says:

"If the meaning of the indictment is equivocal it is insufficient." And again: "If the language employed in the charging part of an indictment be capable of two interpretations without doing violence to its terms, only one of which imports a charge of larceny, the indictment is bad."

In *People* v. *Gates*, 13 Wend., 311, Chief Justice Savage said:

"As to the degree of certainty which is requisite, the indictment must state the facts of the crime with as much certainty as the nature of the case will admit. In a criminal charge, in the language of Lord Mansfield, there is no latitude of intention to include anything more than is charged; the charge must be explicit enough to support itself, 2 Burr., 1127."

And as to indictments for false pretenses, he continued:

"It is not sufficient merely to state that the defendant did falsely pretend, etc.,—setting forth the several pretenses, but after stating the false pretenses at large, the pleader must by averment falsify each pretense which he intends to rely on at the trial, as he would in an indictment for perjury."

There is little if any conflict of authority on the questions under discussion either as to the degree of certainty required in the charging part of indictments, or as to the necessity for a clear, distinct and unequivocal averment of the *scienter* in cases of this kind.

We beg to refer to a few additional authorities bearing on these questions:

10 Am. and Eng. Ency. Law 566.
Whart. Cr., Pl. & Pr., Sec. 164.
1 Chitty Cr. Law, Side p 228.
1 Bish. New Cr. Proc., Sec. 325
Com. v. *Stout*, 7 Monroe, (Ky.) 247.
State v. *Carpenter*, 54 Vt., 551.
State v. *Doner*, 8 Vt., 424,
State v. *Bradley*, 68 Mo., 140.
Redmond v. *State*, 35 Ohio, St., 81.
Smith v. *State*, 81 Ala., 74.
Com. v. *Bear*, 11 Cush., 414.
Powers v. *State*, 87 Ind., 97
State v. *Daugherty*, 4 Or., 200.

A rule for determining the sufficiency of an indictment, which has often been quoted and approved, was laid down by the Court of Appeals of Virginia in *Com.* v. *Young*. 15 Grat. 664, and is as follows:

"If the indictment may be true, and still the accused may not be guilty of the offense described by statute, the indictment is insufficient."

State v. *Smith*, 11 Or. 205.
State v. *Melville*, 11 R. I. 418.

Let us apply this test to the indictment before us:

It charges that the defendant, who was one of the two editors and publishers of a newspaper, unlawfully, knowingly and feloniously did then and there deposit, and cause to be deposited for mailing and delivery a certain copy of the newspaper which was a lewd, lascivious and indecent paper.

Under this indictment proof that the defendant caused the newspaper to be deposited, by directing an employe to carry the mailing list to the postoffice, would support the allegation that he knowingly deposited and caused to be deposited the paper in question.

The Court knows judicially that a newspaper is composed of many items and articles. Let us suppose that an item or article, obscene and lascivious in character, was somewhere contained in the paper, but that the defendant had not written it, had not read it, and did not have the remotest knowledge that it had a place in the columns of the paper. Now, he in utter ignorance of the existence of the obscene matter in the newspaper, directs an employe to carry all the papers which are to be mailed to the postoffice, and there deposit them for mailing. He knows that this order has been obeyed. When these facts are established every material averment of the indictment has been proven, namely: That the defendant knowingly caused to be deposited in the postoffice for mailing and delivery, a certain obscene, lewd, lascivious and indecent paper.

We submit that according to the test established in the cases cited, this indictment must be held insufficient, when assailed seasonably before trial, by a demurrer or motion to quash

It is an elementary rule of criminal pleading, which has not been questioned, that wherever the intention of the party is necessary to constitute an offense, such intent must be alleged in every material part of

the description where it so constitutes it: thus, where a forged order was presented, and money obtained thereby, and the indictment alleged that the defendant, with intent to cheat, knowingly pretended it to be genuine, but did not aver the obtaining money thereby to have been done knowingly, it was held bad

1 Chitty, Cr. L. 232–233.
Rex v. *Rushworth*, 1 Stark. R. 396.
Russ & Ry. 317
Com. v. *Slack*, 19 Pick 304.

It is said by Wharton in his work on Criminal Pleading and Practice, Sec. 166, that the degree of particularity necessary in setting out the offense can be best determined by examining the objects for which such particularity is required, and the following are among such objects as are designated by him:

"That the defendant's conviction or acquittal may enure to his subsequent protection.

"To enable the defendant to prepare for his defence in particular cases, and to plead in all; or if he prefers it, to submit to the court by demurrer, whether the facts alleged (supposing them to be true) so support the conclusion of law, as to render it necessary for him, to make any answer to the charge.

"To enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment.

"To guide a court of error in its action in revising the record."

The circumstances which surround the defendant, and the court, when a motion in arrest of judgment is presented, are widely different, from those which exist before the trial when the demurrer or motion to quash is interposed.

The motion in arrest, is made after the trial, with all the evidence before the court, so that the judge is able to determine with some degree of accuracy, whether the defendant has been prejudiced by reason of defects in the indictment.

In a case like this, such evidence might have shown, that the defendant wrote the obscene article, put it in type, had full knowledge of its insertion in the paper, and mailed it with his own hand. In the face of such evidence a court might well say, of a defect in the indictment as Mr. Justice Harlan said in the Rosen case, that "this defect should be regarded after verdict, and under the circumstances attending the trial as one of form under section 1025, etc."

But where the objection to the indictment is by demurrer, the defendant stands upon the very threshold of his defense, presumptively innocent, and entitled to every safeguard which the laws of this country and England have, for more than a century, thrown about all men similarly situated.

He is entitled to take the judgment of the Court upon the question as to whether, as matter of law, the facts as pleaded in the indictment, are sufficient, under the rules for the construction of such instruments, to constitute the crime, which he will presently be called to answer. And in determining this question, the enlightened and humane rules, so

long and so tenaciously adhered to by all the courts, are to be invoked in his behalf.

Every presumption is in his favor. There are to be no "inferences by common intendment." Nothing is to be imported into the indictment by construction. There is to be "no latitude of intention to include any thing more than is charged."

There must be no uncertainty or ambiguity in the language charging crime, which requires debate to determine its meaning. If the meaning of the language is doubtful, it is insufficient.

These rules are to be applied by the court, without knowledge as to what the evidence may show, and as though no evidence were ever to be heard. He has only before him the indictment, to be tested in its sufficiency, by the law. Can it be said, that there is any uncertainty in the law to be applied, under such circumstances?

Applying to the indictment under discussion the tests, which have been approved by all the courts, is there doubt of its insufficiency on demurrer before trial?

It is conceded that knowledge—guilty knowledge—of the character of the paper alleged to have been deposited, must be alleged in the indictment.

Where is the allegation?

It is only found in the adverb "knowingly" alongside the adverb "feloniously."

In order to make good this strained construction, there must be argument to prove, that the adverb "knowingly" first qualifies the words "deposited, and caused to be deposited," and then qualifies the succeeding phrase "for mailing and delivery through the mails," after which it must be carried forward and made to do duty again in imputing to the defendant knowledge of the indecent and lewd article alleged to have been contained in the newspaper.

To hold such an indictment, which assumes to charge an infamous crime, sufficient as against a demurrer, would be to establish a rule of criminal pleading, not heretofore recognized, and put a premium upon lax and careless pleading, which has never been regarded as promotive of public justice.

We most earnestly insist, that in the light of all the authorities, the court below erred in overruling the motion to quash the indictment, and that its judgment herein should be reversed.

Respectfully submitted,

JOHN W. KERN,

Attorney for Plaintiff in Error.

Transcripts
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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

JAMES B. WILSON, PLAINTIFF IN ERROR,
v.
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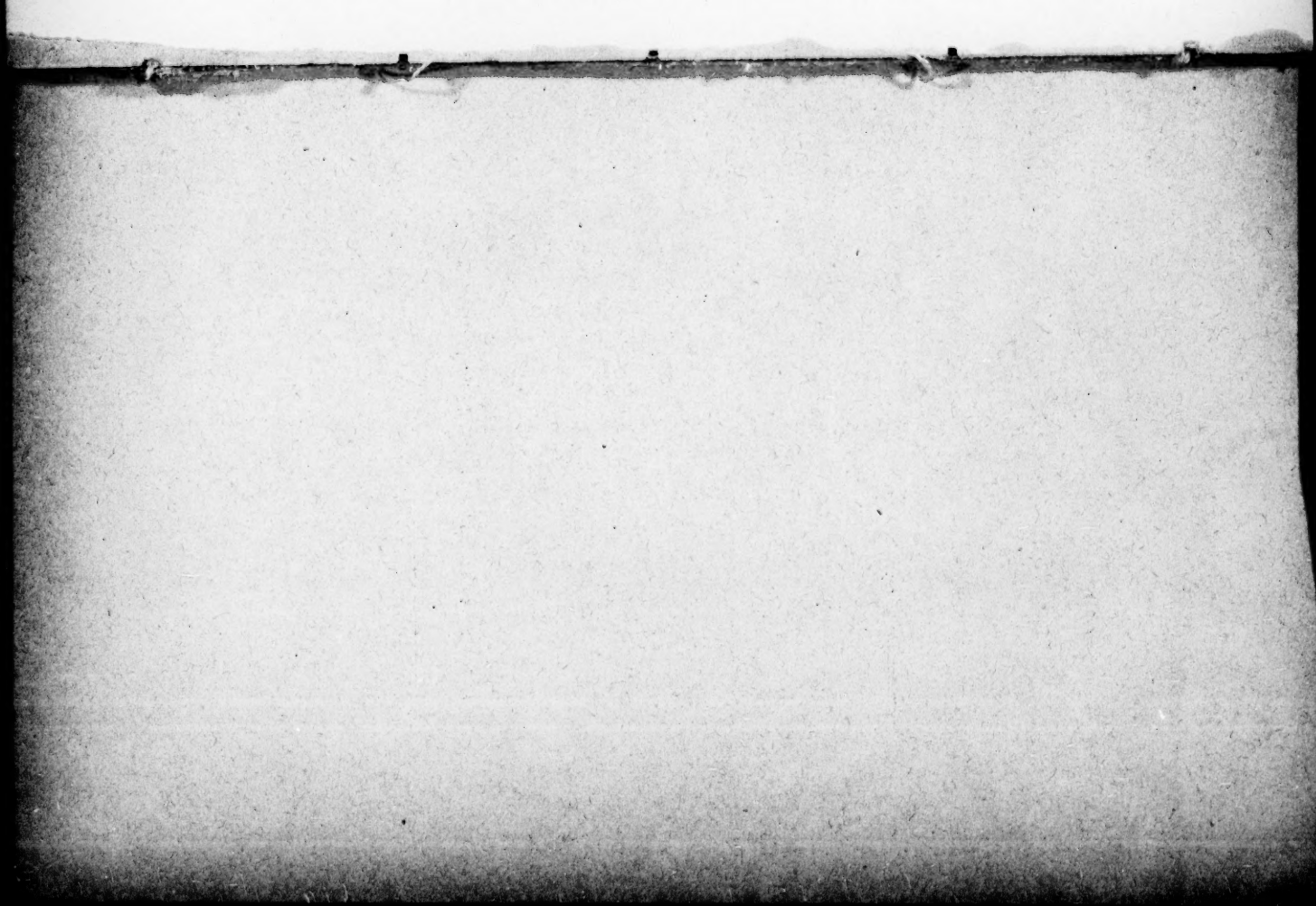
} No. 416.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR THE UNITED STATES.



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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiff in error was indicted for depositing an obscene paper in the post-office at Indianapolis to be sent through the United States mails to Southport, Ind. (Rec., p. 2.)

He was tried and found guilty as charged in the indictment. (Rec., p. 3.) The court sentenced him to two years' imprisonment at hard labor in the Northern State prison of the State of Indiana, and to pay a fine of $250, together with costs. (Rec., p. 4.)

There was no bill of exceptions.

POINTS AND ARGUMENT.

I.

The first assignment of error is as follows:

> That the court below, to wit, the United States district court for the district of Indiana, erred in overruling his motion to quash the indictment herein, the said indictment not containing facts sufficient in law to constitute a crime against the statutes of the United States. (Rec., pp. 6, 7.)

The motion to quash the indictment assigned no ground. (Rec., p. 3.)

The assignment in this court is that the indictment did not contain facts sufficient in law to constitute a crime against the statutes of the United States.

The indictment is founded on section 3893 of the Revised Statutes, which, as amended by the act of September 26, 1888 (25 Stat. L., 496), is as follows:

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor

by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court. And all offenses committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself.

The indictment avers that the accused—

"unlawfully, knowingly, and feloniously did then and there deposit and cause to be deposited for mailing and delivery through the mails of the United States in the post-office at the city of Indianapolis, in said district, a certain obscene, lewd, lascivious, and indecent paper, then and there known and designated as The People, and dated Indianapolis, Indiana, Saturday Dec. 3, 1894, which said paper was then and there inclosed in a wrapper and directed and addressed as follows, to wit: A. S. Snider, Southport, Marion County, Ind.; which said obscene, lewd, lascivious, and indecent paper and publication is so obscene, lewd, lascivious, and indecent as to be offensive to the court, and is not fit matter to appear in the records of this court, and for which reason the same is not set out in the indictment." (Rec., p. 2.)

The indictment was substantially like that in Rosen *v.* United States (161 U. S., 31).

It was not necessary to set out the obscene matter in the indictment. (Rosen *v.* United States, 161 U. S., 34.)

II.

The second assignment of error is as follows:

> There is also error in this, to wit, that the said court erred in overruling his motion in arrest of judgment herein. (Rec., p. 7.)

The motion in arrest of judgment is as follows:

> Comes now the defendant in the above-entitled cause and moves the court here that judgment herein be arrested and not pronounced or rendered, for the reason:
>
> 1. That the indictment herein does not state facts sufficient to constitute a public offense.
>
> 2. That the indictment herein is defective in this, to wit, that it does not indicate nor pretend to indicate the part or parts of the newspaper therein mentioned which contained objectionable matter; and that said indictment does not charge that the defendant had knowledge that said paper contained lewd, indecent, obscene, or other objectionable matter. (Rec., p. 4.)

1. The first ground of the motion to arrest judgment is the same as that relied on to quash the indictment.

2. The second ground is not well taken. It was not necessary to designate the parts of the paper specially referred to. It does not appear from the record that any bill of particulars was asked for, or that any

objection was made to the introduction of the paper in evidence. This question is governed by Rosen *v.* United States (161 U. S., 34).

3. The indictment charged that defendant "knowingly" mailed the paper. This was sufficient if it contained lewd matter, and the jury found that it did. It was not necessary to charge or show that defendant knew that the matter was in law lewd, obscene, etc. (Rosen *v.* United States, 161 U. S., 41.)

J. M. DICKINSON,
Assistant Attorney-General.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 416

JAMES B. WILSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR ON PETITION FOR REHEARING.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 416

JAMES B. WILSON, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR ON PETITION FOR REHEARING.

A motion has been filed praying that the judgment of affirmance heretofore entered on the default of the plaintiff in error, be set aside and the cause be again set down for hearing; or, if under the practice of this court such action cannot be had, that a rehearing be granted herein.

We are advised that before this motion can be granted, the court must be convinced that there is such merit in the appeal, as to warrant the relief prayed.

We therefore address ourselves to a discussion of the sole question presented by the assignment of errors, namely, the sufficiency of the indictment.

The indictment, which is set out on pages 2 and 3 of the transcript of record, charged that the defendant, who was one of the publishers and editors of a newspaper, "unlawfully knowingly and feloniously did then and there deposit and cause to be deposited, for mailing and delivery through the mails of the United States in the postoffice at the city of Indianapolis a certain obscene, lewd, lascivious and indecent paper, then and there known and designated as The People, and dated Indianapolis, Indiana, December 3, 1894, which said paper was then and there enclosed in a wrapper and directed and addressed as follows, towit: A. S. Snyder, Southport, Marion Co. Ind; which said obscene, lewd, lascivious and indecent paper and publication is so obscene, lewd lascivious and indecent as to be offensive to the court, and is not

fit matter to appear in the records of this court, and for which reason the same is not set out in the indictment; that said paper purports to be a newspaper published and edited by the said James B. Wilson and one Enos B. Reed contrary to the form, etc."

The record shows that at the proper time, before the trial the defendant moved to quash the indictment, which motion was by the court overruled, to which ruling on such motion the defendant at the time excepted. (Transcript of Record, page 3.)

The objection to the indictment which was urged upon the trial court, and to which we invite the attention of the court here, is that it is not charged therein that the defendant had knowledge, information, or notice of the contents of the newspaper in question which were alleged to be obscene and non-mailable.

It is disclosed by the indictment that the paper alleged to have been mailed was a newspaper, having two editors and publishers, one of whom was the defendant, and the allegation is that the defendant did unlawfully, knowingly and wilfully deposit, or cause to be deposited, the newspaper described.

The case of *Rosen* vs. *United States*, 161 U. S. 29, on the authority of which the judgment of the court below in this case was affirmed, is not decisive of the question presented by the assignment of errors herein.

In that case, no question was made as to the sufficiency of the indictment before the trial, it being challenged for the first time by a motion in arrest of judgment.

In this case, as has been shown, there was a motion to quash the indictment, and exceptions to the action of the court in overruling the same, properly saved.

In the Rosen case, the indictment was in most respects identical with the indictment here, and the court speaking through, Mr. Justice Harlan said of it:

"Undoubtedly the mere depositing in the mail of a writing, paper or other publication of an obscene lewd or lascivious character, is not an offence under the statute, if the person making the deposit was at the time, and in good faith without knowledge, information or notice of its contents. The indictment would have been in better form if it had more distinctly charged that the accused was aware of its character. But, *this defect should be regarded, after verdict, and under the circumstances attending the trial*, as one of form under section 1025 of the Revised Statutes, providing that the proceedings on an indictment found by a Grand Jury in any District, Circuit, or other court of the United States, shall not be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

And again:

"The case is therefore not one of the total omission from the indictment of an essential averment, but at the most, one of the inaccurate, or imperfect statement of a fact; and such statement, *after verdict* may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

So, it will be seen that in the Rosen case there was nothing decided on the point here involved, except that such an indictment, after verdict

and under the circumstances attending that trial, as disclosed by the record in that case, would be held good under section 1025 R. S., *supra*.

The decision in the Rosen case goes only to the same extent as the opinion of Mr. Justice Gray in the case of *United States* vs. *Chase*, 27 Fed. R. 807.

In that case the indictment charged that the defendant knowingly deposited the letter, and not that he knew its character. Its sufficiency was challenged for the first time by a motion in arrest of judgment, and the case of *Commonwealth* vs. *Boynton*, 12 Cush, 499, relied on in support of the motion.

Mr. Justice Gray did not question the law as laid down in the Boynton case, but held that the objection came too late and that under section 1025 R. S., *supra*, was not available by a motion in the arrest of judgment.

While it is true as stated in the Rosen case, that inaccurate and imperfect statements of fact in an indictment, "may be taken after verdict in the broadest sense authorized by the words used," will it be contended for a moment that such a rule should be invoked in the construction of an indictment on a motion to quash?

On the contrary, we think it will be conceded that a rule precisely opposite must govern.

It was held by this court in *U. S.* vs. *Cook* 17 Wallace 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged," and in the case of *United States* vs. *Cruikshank*, 92 U. S. 542, Chief Justice Waite after quoting the above with approval, added:

"It is an elementary principle of criminal pleading, that when the definition of an offense whether it be at common law or by statute includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species; it must descend to particulars. 1 Arch. Crim. Pr. and Pl. 291. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time place and circumstances."

See also *U. S.* vs *Carll*, 105 U. S., 611.

A rule by which the sufficiency of an indictment may be tested, which has often been quoted and approved was laid down by the Court of Appeals of Virginia in the case of *Commonwealth* vs. *Young*, 15 Grat. 664, and is as follows:

"If the indictment may be true, and still the accused may not be guilty of the offense described by statute, the indictment is insufficient."

Let us apply this test to the indictment in question. It charges that the defendant, who was one of the two editors and publishers of a newspaper, unlawfully, knowingly and feloniously did then and there deposit, and cause to be deposited for mailing and delivery through the mails a certain copy of the newspaper which was a lewd, lascivious and indecent paper.

If it be admitted that the defendant was one of such editors and publishers, that he knowingly, etc., caused a copy of his newspaper to be deposited in the postoffice for mailing, and that the paper in question contained somewhere in its columns an obscene article or item, then there is an admission of every charge in the indictment; yet the defend-

ant may not have read the obscene article nor had the remotest knowledge that it was contained in the newspaper. It is true the word "knowingly" is in the indictment, but so are the words "unlawfully and feloniously," and all of them refer to the act of depositing or causing to be deposited.

In the case of *United States* vs *Carll supra* the indictment charged that the defendant *feloniously and with intent to defraud* a bank named, did pass, utter and publish upon said bank a falsely made, forged, counterfeited and altered obligation and security of the United States which was set out according to its tenor.

It was not charged that the defendant had knowledge of the character of the counterfeited money, but the charge was explicit that he had acted "feloniously and with intent to defraud" the bank upon which he had passed and uttered it.

Mr. Justice Cray, speaking for the Court, said:

"In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves *fully, directly, and expressly*, without any *uncertainty* or *ambiguity*, set forth all the elements necessary to constitute the offense intended to be punished, and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

The indictment in that case was held bad because it did not charge the defendant with knowledge of the character of the money alleged to to have been uttered by him, although the uttering was charged to have been done feloniously and with intent to defraud.

Suppose the word "knowingly" had followed the word "feloniously" in that indictment: will any one claim that it would have remedied the defect, and supplied the requirement as defined by the court?

If the word "knowingly" added to that indictment would not have remedied its infirmity, upon what principle of law will it be contended that the word "knowingly" in this indictment, coupled with the words "unlawfully and feloniously" will supply the place of the averment required by all the authorities that the defendant had knowledge of the character of the paper deposited or caused to be deposited in the mails?

It is an elementary rule of criminal pleading, that wherever the intention of the party is necessary to constitute an offense, such intent must be alleged in every material part of the description where it so constitutes it: Thus where a forged order was presented and money obtained thereby, and the indictment alleged that the defendant with intent to cheat, knowingly pretended it to be genuine, but did not aver the obtaining money thereby to have been done knowingly, it was held bad.

1 Chitty Cr. L. 232–3.
Rex vs. *Rushworth* 1 Stark. R. 396.
Russ & Ry. 317.
Com. vs. *Slack* 19 Pick. 304–7.

The case of *Commonwealth* vs. *Boynton*, 12 Cush. 499, is in point, and has been cited with approval more frequently perhaps than any other

case bearing on this question. In that case the indictment charged that the defendant "did knowingly sell unto B. a certain piece of diseased, corrupted and unwholesome provision, viz.: one hind leg of veal, not making known to said B. that the same was diseased, etc."

The indictment was objected to because of the omission to aver a knowledge on the part of the defendant that the meat sold was diseased. The question was whether this omission was cured by the use of the word "knowingly." The Court said: "In the present indictment the only distinct averment of knowledge on the part of the defendant is that he 'knowingly sold' corrupt and unwholesome meat. There is no averment that he knew the meat to be in a diseased and unhealthy state or unfit for food at the time of the sale. The word "knowingly" does not apply to and qualify every act charged essential to constitute the offense under the statute; strictly speaking, and construing the language of the indictment according to the technical rules of pleading, it qualifies and gives significance only to the word "sell;" so that in substance and legal effect, the averment is only that the act of sale was done by the defendant knowingly. * * The whole allegation might therefore be true, and yet the defendant might be innocent of any offense. * * * The averment of knowledge does not extend to each part of the description of the offense in which it is an essential element. The indictment, therefore, is fatally defective, because it does not describe in apt and technical terms any criminal act for which the defendant can be held responsible, or upon which any valid judgment can be rendered."

In the recent case of *United States* vs. *Reid*, reported in 73 Fed. R. 289, the identical question under discussion was considered. In the course of his decision Judge Severens said:

"The decisions in the various Federal Courts upon the question whether the employment of the words "unlawfully and knowingly" applies not only to the depositing, but also to the character of the thing deposited, are apparently in some conflict. The result to be drawn from an analysis of all of them, would seem to be that the determination of the question depends upon the time when the objection is made; whether upon the arraignment and before trial, or after trial and verdict, the objection not having been previously made."

There is a difference in the rule to be applied, and which is applied in all pleadings, whether civil or criminal, at one of these stages, from that which applies at the other. * * * * The authorities upon the precise question now under consideration may be nearly all harmonized by this distinction: that the word "knowingly" in connection with the words charging the deposit, and the character of the matter deposited will, after trial and verdict, be admitted to have applied to both those elements of the offense, upon the ground that in common speech that would be the ordinary interpretation of such form of expression—that is to say, it would have been an inference by common intendment; and on the other hand, that it would not be regarded as a sufficient averment of knowledge of the character of the thing deposited, under the more stringent rule which applies to pleadings, when tested by a seasonable objection to their sufficiency; and it appears to be the conclusion justly to be drawn from the mass of decisions on the subject, that the form of pleading here employed is not sufficient when tested by the rule of

pleading to which I have adverted."

This decision, it will be observed, is in entire harmony with the Rosen case *supra*, and yet supports our contention here

If the indictment in the Rosen case was defective, in that the statement of a material fact therein was "inaccurate and imperfect" (as characterized by this court), then the indictment in this case is open to the same objection.

The "inaccurate and imperfect statement of fact" in the indictment in the Rosen case was held to have been cured by verdict, no objection to it having been raised before the trial.

In this case, however, the objection now being urged was raised seasonably—before trial, and hence the decision in that case ought not to be considered as authority in this.

We do not believe that this court intended to reverse, or set at naught any of the elementary principles by which the sufficiency of indictments has been tested in this country and England for more than a century. One of these rules is "that the defendant must be brought within all the material words of the statute and that nothing will be taken by intendment."

State vs. *Gove*, 35 N. H. 510.
I Chitty, Crim. Law, 281–3.
1 Arch. Crim. Pl. 50.
People vs. *Allen*, 5 Deriv. 76.

Tested by this rule, and the authorities cited, we submit that the indictment under consideration was insufficient to withstand a motion to quash, seasonably made, and that the judgment of the lower court ought to be reversed.

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Atty for Plff in Error